UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NICOLE ARCHIBALD and ELLEN OGAIAN on behalf of themselves and all others similarly situated, Plaintiffs, - against - MARSHALLS OF MA, INC., a Delaware corporation; MARMAXX OPERATING CORPORATION, d/b/a MARMAXX GROUP, a Delaware corporation; THE TJX COMPANIES INC. a Delaware corporation, and DOES 1 through 100, inclusive, Defendants.	:	**09-CIV-2323 (LAP)**

DEFENDANTS' REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS OR TO STRIKE

Dated: New York, New York
June 22, 2009

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 3

I. PLAINTIFFS' CLAIM FOR OVERTIME MUST BE DISMISSED. 3

A. The Commissioner's Overtime Regulation Exceeds the Language and Purpose of the Minimum Wage Act. 3

B. The Overtime Regulation Improperly Incorporates the FLSA, Its Regulations and Future Changes 6

II. PLAINTIFFS HAVE NOT CURED CPLR 901(b)'s BAR TO THEIR CLASS CLAIM. 8

III. PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF AND RELIANCE ON ARTICLE 19 MUST BE STRICKEN FROM THE COMPLAINT. 9

IV. MARMAXX GROUP IS NOT PLAINTIFFS' EMPLOYER. 10

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Ansonia Associates v. Ansonia Residents Ass'n,
78 A.D.2d 211 (1st Dep't 1980) 9

Bay Shore Family Partners, L.P. v. Found. of Jewish Philanthropies of the Jewish Fed'n,
239 A.D.2d 373 (2d Dep't 1997) 5

Boreali v. Axelrod,
71 N.Y.2d 1, 523 N.Y.S.2d 464 (1987) 4

City of New York v. State,
94 N.Y.2d 577 (2000) 9

Coca-Cola Bottling Co. v. Bd. of Estimate,
72 N.Y.2d 674 (1988) 7

Diaz v. Electronics Boutique of Am., Inc.,
No. 04-CV-0840E (SR), 2005 U.S. Dist. LEXIS 30382 (W.D.N.Y. Oct. 13, 2005) 6

Dorst v. Pataki,
167 Misc. 2d 329 (Sup. Ct. 1995) 4

Health Ins. Ass'n v. Corcoran,
154 A.D.2d 61 (3d Dep't 1990) 4

Law Enforcement Officers Union, Dist. Council 82 v. State,
229 A.D.2d 286 (3d Dep't 1997) 4

Leonard v. Dutchess County Dep't of Health,
105 F. Supp. 2d 258 (S.D.N.Y. 2000) 4

Mutual Shares Corp. v. Genesco, Inc.,
384 F.2d 540 (2d Cir. 1967) 9

N.Y. State Coalition of Pub. Employers v. N.Y. State Dep't of Labor,
60 N.Y.2d 789 (1983) 8

Pajak v. Pajak,
56 N.Y.2d 394 (N.Y. 1982) 5

People v. Frink Am., Inc.,
2 A.D.3d 1379 (4th Dep't 2003) 9

People v. Mobil Oil Corp.,
101 Misc. 2d 882 (Dist. Ct. 1979) 7

TABLE OF AUTHORITIES
continued

Page(s)

Rubin v. Nine West Group, Inc.,
No. 0763/99, 1999 N.Y. Misc. LEXIS 655 (Sup. Ct. Aug. 24, 1999) 9

Telectronics Proprietary, Ltd. v. Medtronic, Inc.,
687 F. Supp. 832 (S.D.N.Y. 1988) 9

Utah League of Insured Sav. Assocs. v. Utah,
555 F. Supp. 664 (D. Utah 1983) 7

Zheng v. Liberty Apparel Co.,
355 F.3d 61 (2d Cir. 2003) 6

FEDERAL STATUTES

52 Stat. 1060, 1063, § 7(a) 5

29 U.S.C. § 213(a)(1) 7

29 C.F.R. § 541.0 *et seq.* 8

STATE RULES AND STATUTES

N.Y. Lab. Law § 198(1-a) 1

N.Y. Lab. Law § 220 5

N.Y. Lab. Law § 650 ..... 3, 5

N.Y. Lab. Law § 655(5)(b) 3

CPLR 901(b) 1, 8

12 N.Y.C.R.R. § 142-2.2 ..... 5, 6, 7

N.Y. Const. art. II, sec. 1 4

PRELIMINARY STATEMENT

Plaintiffs' opposition memorandum does not cure their Amended Complaint from its fundamental defects. Despite repeated protestations about an apparent "mountain" of cases upholding their contentions, and notwithstanding their other efforts to escape the consequences of their improper pleading, Plaintiffs' complaint is deficient as a matter of law and should be dismissed.[1]

With respect to Defendants' central argument, concerning the absence of a statutory right to overtime under New York law, Plaintiffs have missed the point. They rely on the unquestioned existence of a *regulation* mandating overtime for certain New York employees, but cannot identify any *statute* to that effect, or any statute that confers authority on the Commissioner of Labor to issue such a regulation. Instead, they advance a contorted interpretation of the New York Labor Law ("NYLL") that attempts to find such authority where none exists. They also cite to cases (none from New York State courts) that, while approving awards of overtime payments, do not discuss, let alone refute, the specific arguments Defendants are advancing here.

Plaintiffs' defense of their failure to waive liquidated damages in their Amended Complaint is similarly unavailing. Section 901(b) of the CPLR expressly disallows a class action where the statute under which the action is brought imposes a penalty. As stated in Defendants' opening brief, section 198(1-a) of the NYLL provides for the penalty of liquidated damages where a willful violation is found. (Def. Mem 9-10) Plaintiffs have specifically alleged that Defendants willfully violated the NYLL, but also would pursue that claim on behalf of a class. In order to do so, Plaintiffs were required to waive liquidated damages, yet they have not. To the extent Plaintiffs are now seeking to remedy this oversight in their opposition papers, their class claim must still be stricken because they cannot, as a matter of law, amend their complaint in their motion papers.

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[1] Throughout this Reply, Defendants' opening memorandum will be referred to as "Def. Mem."; Plaintiff's Opposition to Motion to Dismiss will be referred to as "Pl. Opp."; and the Complaint will be referred to as "Compl. ¶ __."

Similarly, Plaintiffs' argument in support of their request for injunctive relief is without merit. Simply put, a claim for overtime is a claim for money, and it follows that a money judgment would provide more than adequate relief for any such claim. Plaintiffs' request for injunctive relief – a remedy that assumes the inadequacy of monetary relief – must therefore be stricken from the complaint. The portions of the Amended Complaint that rest on the Minimum Wage Act must likewise be stricken because Plaintiffs have not asserted any minimum wage violations in their Complaint.

Finally, the Marmaxx Group is not Plaintiffs' employer within the meaning of the NYLL. It has no place in this litigation and should be dismissed.

ARGUMENT

I. PLAINTIFFS' CLAIM FOR OVERTIME MUST BE DISMISSED.

A. The Commissioner's Overtime Regulation Exceeds the Language and Purpose of the Minimum Wage Act.

In the label for section II.B.1 of their memorandum, Plaintiffs assert that they have a "statutory" right to overtime under NY law. But they conspicuously fail to cite to any *statute*. While Defendants do not dispute that the Commissioner of Labor took it upon himself to create an overtime regulation, their principal contention – which Plaintiffs do little to counter – is that the Minimum Wage Act, NYLL §§ 650 *et seq*. does not grant the Commissioner authority to impose that obligation.

The "statement of public policy" of the Minimum Wage Act provides, in relevant part, that "[t]here are persons employed in some occupations in the state of New York at wages insufficient to provide adequate maintenance for themselves and their families . . . To this end minimum wage standards shall be established and maintained." NYLL § 650. In keeping with this stated purpose, the Legislature granted the Commissioner the power to investigate the sufficiency of the minimum wage, and stated that if he is of the opinion that the minimum wage is insufficient, he must appoint a wage board to inquire into and report and recommend adequate minimum wages. Under § 655(5)(b) of the NYLL, the wage board, in addition to making recommendations regarding minimum wages, may "recommend such regulations as it deems appropriate to carry out the purposes" of the Minimum Wage Act, including "overtime or part-time rates."

Thus, instead of requiring overtime pay, the Minimum Wage Act merely alludes to the possibility that the Commissioner might appoint a wage board and that the board might recommend "overtime or part-time rates" to the Commissioner. The statute does not, however, empower the Commissioner to assume the fundamentally *legislative* role of enacting an overtime mandate on New York employers that carries the force of law.

Such power lies exclusively with the Legislature. *See* N.Y. Const. art. II, sec. 1 ("the legislative power of [New York State] shall be vested in the senate and assembly"). To the extent a state agency seeks to usurp that legislative role, its action must be invalidated as a matter of law. *See Boreali v. Axelrod*, 71 N.Y.2d 1, 9, 523 N.Y.S.2d 464, 468 (1987) (invalidating regulation and holding that "the legislative branch of government cannot cede its fundamental policy-making responsibility to an administrative agency"); *Law Enforcement Officers Union, Dist. Council 82 v. State*, 229 A.D.2d 286, 292 (3d Dep't 1997) ("An agency's administrative rule-making authority, which is derived from the delegation of legislative power, must be exercised within the parameters of the agency's enabling statutes."); *Dorst v. Pataki*, 167 Misc. 2d 329 (Sup. Ct. 1995) ("the Legislature cannot delegate its lawmaking functions to other bodies"), *aff'd*, 90 N.Y.2d 696 (1997); *Leonard v. Dutchess County Dep't of Health*, 105 F. Supp. 2d 258, 267 (S.D.N.Y. 2000) (Board of Health exceeded authority as administrative agency because it "departed from merely following legislative guidance and went forward into a legislating foray all its own"); *Health Ins. Ass'n v. Corcoran*, 154 A.D.2d 61, 71 (3d Dep't) (invalidating 11 N.Y.C.R.R. § 52.27 on the basis that the Superintendent of Insurance had exceeded his powers in promulgating the regulation because it was the legislature's responsibility to enact laws limiting an insurer's right to assess and accept risks), *aff'd*, 76 N.Y.2d 995 (1990).

Had the Legislature intended to enact an overtime rule applicable to all New York employers – or to empower the Commissioner to establish such a rule – it could have done so in language that would be clear and unmistakable.[2] No such language exists anywhere in the NYLL. The extent of the relevant statutory mandate is to create a minimum wage and authorize an *investigation* into the possible additional need for overtime protections, not to create a right to overtime.[3]

The so-called "mountain" of cases cited by Plaintiffs to support the validity of the Commissioner's overtime regulation (Pl. Opp 10-11) are readily distinguishable. Contrary to Plaintiffs' apparent view, Defendants are not contending that 12 N.Y.C.R.R. § 142-2.2 does not exist. Rather, Defendants contend that the regulation is an improper exercise of the Commissioner's power and an improper adoption of federal laws by the Commissioner. Nevertheless, not one of the cases in the "mountain" addresses the specific arguments Defendants raise here concerning the Commissioner's lack of authority to issue an overtime mandate; while overtime was awarded in those cases, the courts failed to address the validity of the regulation under which such an award was issued.

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[2] For example, the Legislature did provide - by statute – for overtime for public works laborers but not other employees. *See* NYLL § 220. It is an axiom of statutory construction that a legislature is presumed to act intentionally when it includes language in one section but omits it in another. *See Pajak v. Pajak*, 56 N.Y.2d 394 (N.Y. 1982); *Bay Shore Family Partners, L.P. v. Found. of Jewish Philanthropies of the Jewish Fed'n*, 239 A.D.2d 373, 374 (2d Dep't 1997); *see also* McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 74.

[3] Even if the Minimum Wage Act could somehow be construed as the authority for an overtime regulation, the current version of the regulation exceeds the stated purpose of the Act. As noted above, that purpose was to ensure that "persons employed in some occupations . . . receive "adequate maintenance for themselves and their families." NYLL § 650. While the previous version of the overtime regulation was explicitly tied to the State's minimum wage, *see* 12 N.Y.C.R.R. § 142-2.2 (eff. June 23, 1970) ("[t]he overtime rate for all employees shall be one and one-half the basic *minimum hourly rate*") (emphasis added), the current version provides for overtime "at a wage rate of one and one-half times the employee's *regular rate*," *id.* (emphasis added). The latter formulation derives from the overtime provisions of the FLSA – sections 7 and 13 – the purpose of which is not to protect minimum wages, but to "require extra pay for overtime work by those covered by the [FLSA] *even though their hourly wages exceeded the statutory minimum*." FLSA, 52 Stat. 1060, 1063, § 7(a) (emphasis added).

Nor is any of those cases an authoritative statement of New York law from the Court of Appeals. Indeed, Plaintiffs fail to cite even one New York State case in support of their argument. In any event, the federal cases Plaintiffs cite are not on point. For example, the holding in *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003), rested on a joint-employer issue. The court vacated and remanded the dismissal of plaintiffs' FLSA and New York law claims and instructed the District Court to determine whether defendants should have been deemed a joint employer for purposes of liability. Similarly, in *Diaz v. Electronics Boutique of Am., Inc.*, No. 04-CV-0840E (SR), 2005 U.S. Dist. LEXIS 30382 (W.D.N.Y. Oct. 13, 2005), the court found – without any analysis or citation to any New York State court cases – that "overtime claims may be brought pursuant to NYLL § 650 *et seq.* and that implementing regulation 12 N.Y.C.R.R. § 142-2.2 carries the force of the law." These cases hardly carry the day with regard to the validity of the overtime regulation and whether the Commissioner exceeded his authority in promulgating it.

B. The Overtime Regulation Improperly Incorporates the FLSA, Its Regulations and Future Changes.

Even if the Commissioner had the authority to impose a mandatory overtime law by regulation, his regulation is nonetheless invalid because he exercised his authority improperly by delegating it to Congress and the U.S. Department of Labor.

The Commissioner's regulation states that overtime shall be required "in the manner and methods provided in and subject to the exemptions of section 7 and 13 of 29 U.S.C. 201 et seq., the Fair Labor Standards Act of 1938, as Amended." 12 N.Y.C.R.R. § 142-2.2. One of the FLSA sections the Commissioner specifically incorporated by reference, Section 13, exempts individuals "employed in a bona fide executive, administrative, or professional capacity . . . as such terms are defined and delimited from time to time by the Secretary . . . [of Labor]." The

FLSA does not itself define the exemptions but rather leaves the definition to the U.S. Secretary of Labor and specifically contemplates that those definitions will change "from time to time." 29 U.S.C. § 213(a)(1).

Thus, given the plain language of the FLSA, there is no escaping the fact that the Commissioner's overtime regulation specifically incorporates federal regulations that may periodically change. The overtime regulation is therefore invalid. *See Coca-Cola Bottling Co. v. Bd. of Estimate*, 72 N.Y.2d 674 (1988) (recognizing that state agencies may not delegate their obligations to other agencies); *People v. Mobil Oil Corp.*, 101 Misc. 2d 882, 887 (Dist. Ct. 1979) (invalidating county ordinance which incorporated standards of National Fire Protection Association: "[b]y enacting the association's amendments, prior to their adoption, the County of Nassau has delegated to the National Fire Protection Association sovereign and legislative power. . . . Such a procedure is an improper delegation of legislative authority, and therefore unconstitutional"); *see also Utah League of Insured Sav. Assocs. v. Utah*, 555 F. Supp. 664, 674 (D. Utah 1983) ("[I]t is universally held that an incorporation by state statute of rules, regulations, and statutes of federal bodies to be promulgated subsequent to the enactment of the state statute constitutes an unlawful delegation of legislative power.")

In addition to incorporating federal regulations as they are amended from time to time, the Commissioner's overtime regulation incorporates the FLSA itself as amended. Plaintiffs' assertion to the contrary (Pl. Opp. 17-18) is simply wrong. *See* 12 N.Y.C.R.R. § 142-2.2. Indeed, the copy of the FLSA that the Commissioner filed in July 2000 with the Secretary of State was the statute as it had been amended to that date – including *all amendments between 1986 and 2000* – even though the Commissioner promulgated the overtime regulation in 1986. Had the Commissioner intended to incorporate only the FLSA as it existed on December 12, 1986 (the date 12 N.Y.C.R.R. § 142-2.2 became effective), he could have indicated as much in the regulation and, more importantly, he never would have filed the FLSA in 2000 containing numerous amendments to that statute from 1986 to 2000.

Moreover, notwithstanding the Commissioner's filing of a copy of the FLSA with the Secretary of State, Plaintiffs cannot dispute that the FLSA's *regulations* were never so filed. The regulations are not only expressly incorporated into the FLSA, but they are also essential to the Commissioner's overtime scheme (for example, by defining overtime exemptions). *See* 29 C.F.R. § 541.0 *et seq*. Reliance by the Commissioner on the FLSA's regulations required that they too be filed with the Secretary of State, but that has not occurred.

Under somewhat similar circumstances, the New York Court of Appeals invalidated one of the Commissioner's regulations because the Commissioner had failed to file federal OSHA regulations with the Secretary of State. *See N.Y. State Coalition of Pub. Employers v. N.Y. State Dep't of Labor*, 60 N.Y.2d 789 (1983). Thus, because the overtime regulation incorporates the FLSA as amended from time to time, and because the Commissioner did not file the FLSA's regulations with the Secretary of State, the Commissioner's overtime regulation is invalid. Plaintiffs' single claim for relief seeking overtime wages pursuant to NYLL Articles 6 and 19, as well as 12 N.Y.C.R.R. § 142-2.2 (Compl. ¶¶ 15, 25–27) is therefore impermissible as a matter of law and must be dismissed.

II. PLAINTIFFS HAVE NOT CURED CPLR § 901(b)'s BAR TO THEIR CLASS CLAIM.

As stated in Defendants' opening brief, Plaintiffs' state law class claim must be dismissed because CPLR Section 901(b) prohibits the use of class actions for claims to recover a penalty. (Def. Mem. 9-10) Plaintiffs argue that they can sidestep this bar because, they say, they are not seeking liquidated damages. (Pl. Opp. 19-20)

Unfortunately for Plaintiffs, their *Complaint* does not so state; it seeks broad-based relief and claims that Defendants willfully violated the NYLL (Compl. ¶¶ 4 & 27), the predicate to an award of liquidated damages. (Def. Mem. 9-10) To the extent Plaintiffs would waive liquidated damages in their memorandum of law (Pl. Opp. 20), their effort is improper. *See Rubin v. Nine West Group, Inc.*, No. 0763/99, 1999 N.Y. Misc. LEXIS 655 (Sup. Ct. Aug. 24, 1999) (rejecting attempt to waive penal damages in counsel's memorandum of law to avoid § 901(b)); *Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 687 F. Supp. 832, 836 (S.D.N.Y. 1988) ("A claim for relief may not be amended by the briefs in opposition to a motion to dismiss") (quotations omitted).

III. PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF AND RELIANCE ON ARTICLE 19 MUST BE STRICKEN FROM THE COMPLAINT.

It is well settled in New York that an injunction is an improper remedy where adequate relief can be obtained by a money judgment. *See People v. Frink Am., Inc.*, 2 A.D.3d 1379, 1381 (4th Dep't 2003); *City of New York v. State*, 94 N.Y.2d 577, 599 (2000). In their Complaint, Plaintiffs seek an order enjoining Defendants from classifying assistant managers as exempt from overtime. (Compl. ¶ 2 of *Prayer for Relief*) Because Plaintiffs can receive adequate relief in the form a money judgment providing for unpaid overtime, there is no need for equitable relief. Plaintiffs' claim for injunctive relief must therefore be stricken.[4]

[4] Plaintiffs' reliance on *Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d 540 (2d Cir. 1967), and *Ansonia Associates v. Ansonia Residents Ass'n*, 78 A.D.2d 211 (1st Dep't 1980), is misplaced, as neither case deals with overtime issues or is remotely on point. In *Mutual Shares*, the plaintiffs sued under the Securities Exchange Act of 1934. The court held that an injunction *may* be appropriate to stop defendants from depressing the price of certain publicly traded stock by market manipulation. In *Ansonia*, a tenants' association solicited tenants to deposit their rents into an escrow account because the apartments were uninhabitable. The landlord sought to enjoin the tenants and the association from collecting and withholding rent to stop the inducement to breach rental obligations. The court modified the lower court's issuance of an injunction only to prevent the tenant's association from paying out the deposited rent to the tenants or anyone else.

For the same reasons, and also because Plaintiffs have not made any allegations in their Complaint about minimum wage violations, their reliance on the Minimum Wage Act is improper. (Def. Mem. 11) Plaintiffs' argument that the Act "regulates overtime compensation," (Pl. Opp. 21) is unavailing for the reasons discussed above. This Court should therefore strike those portions of Plaintiffs' Complaint that cite to the Minimum Wage Act.

IV. MARMAXX GROUP IS NOT PLAINTIFFS' EMPLOYER.

One of the named Defendants in this action is "Marmaxx Operating Corporation, d/b/a Marmaxx Group."[5] Despite Plaintiffs' provision of training materials and performance evaluations that refer to Marmaxx or the Marmaxx Group, they cannot demonstrate that this corporation is their *employer*. As such, the Marmaxx Group should be dismissed from this action.[6]

CONCLUSION

For the foregoing reasons, and for the reasons argued in Defendants' opening memorandum, this Court should dismiss the Complaint with prejudice in its entirety, or, in the alternative, dismiss Plaintiffs' class claim with prejudice, strike Plaintiffs' request for injunctive relief, strike the portions of the Complaint that cite to Article 19 of the Labor Law as a basis for overtime, and dismiss Marmaxx Group from this action.

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[5] In footnote 7 of their opposition, Plaintiffs note that the Declaration of Joan Korzec-Brown is improper because of the absence of an "under penalty of perjury" statement. Defendants disagree, but in an abundance of caution will file a revised declaration under separate cover.

[6] Footnote 6 of Plaintiff's memorandum is not accurate. After Defendants' motion was filed, Plaintiffs offered to dismiss Marmaxx without prejudice in return for an agreement tolling the statute of limitations as to claims against Marmaxx. Defendants countered that offer by proposing dismissal without prejudice and no tolling. Plaintiffs did not respond.

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Respectfully submitted,

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